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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY SMITH et al,

Defendants and Appellants.

B286716

(Los Angeles County
Super. Ct. No. BA449735)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Kathleen Kennedy, Judge. Reversed.

Susan K. Shaler, under appointment by the Court of
Appeal, for Defendant and Appellant Tony Smith.

Brad Kaiserman, under appointment by the Court of
Appeal, for Defendant and Appellant Kevin Black.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief
Assistant Attorney General, Lance E. Winters, Assistant
Attorney General, William H. Shin, Robert M. Snider and Susan
Sullivan Pithey, Deputy Attorneys General, for Plaintiff and
Respondent.

INTRODUCTION

Appellants Tony Smith and Kevin Black were convicted of second degree murder based in large part on video surveillance footage. The disc with the footage, which was provided to all counsel, shown at trial for the jury, and admitted into evidence, included software that played the video at one frame-per-second, for a total of 1800 frames. At all times all counsel believed the 1800 frames comprised the totality of the footage. During deliberation, however, the jury was provided with a laptop computer with a code and different software that enabled the jury to view the video surveillance footage at 30 frames-per-second. As a result, the jury was able to view 53,926 additional frames of visual information that Black and Smith never knew existed. Many of these frames of video footage revealed information to the jury that was not observable in the footage on the disc admitted at trial.

After the verdict, counsel for all parties discovered the jury had viewed evidence never admitted at trial. Smith and Black raise several arguments on appeal, including that the trial court erred in denying their motion for new trial based on the discovery that the jury had viewed video frames never shown, admitted, addressed, or argued at trial. Although we find no misconduct on the part of the People, the court, or the jury, we conclude it was error for the jury to receive this additional evidence. We also conclude the error prejudiced Black's and Smith's ability to confront and cross-examine all the evidence in this case and to make strategic decisions with their respective attorneys about how to confront this additional evidence. Finally, we conclude appellants may have received a more favorable outcome at trial had the jury never viewed the additional video frames.

Accordingly, we reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Black and Smith were charged with first degree murder. Count 1 further alleged Black personally and intentionally discharged a firearm causing great bodily injury and death, personally and intentionally discharged a gun, and personally used a gun. Count 1 also alleged Smith knew Black was personally armed. Count 2 alleged Black was a felon in possession of a firearm and Count 3 alleged Smith was a felon in possession of a firearm. The information also alleged Smith suffered two prior strike convictions in 1975 and 1983 for robbery, and Black suffered one prior conviction on 2011 for possession of a controlled substance. The trial court granted Smith's motion for judgment of acquittal on Count 3.

I. Relevant Evidence Adduced at Trial

Witness Imani Bakari-Tyree (Bakari) and victim Mark Tyree were married in 2002, and had three children together. Tyree had a history of violent and aggressive behavior, leading Bakari to call the police several times and to obtain a restraining order against him in 2006. On one occasion, Tyree became belligerent with police officers. Tyree stood over six feet tall and weighed about 275 pounds. Bakari and Tyree formally separated in 2006, but they remained close.

In 2006, Bakari met appellant Smith at a club. They developed a sexual relationship but never dated seriously. They remained close friends until 2008 or 2009 and then lost contact for a number of years. Tyree and Smith had met and spoken a few times socially, but Tyree was not fond of Smith.

In March 2016, Bakari and Smith began seeing each other again. They resumed their sexual relationship and would drink

and use narcotics together. Tyree knew that Bakari and Smith were spending the night together.

On August 10, 2016, Smith picked up Bakari to take her to his home. Bakari put her purse with her registered handgun into the trunk of Smith's car. En route, they began to argue, and Bakari asked Smith to take her back to the area where he had picked her up. When they returned to that area, Smith refused Bakari's request to open the trunk and told Bakari he intended to sell her handgun because she owed him money. After Smith dropped Bakari off, he drove away quickly. A few days later, Bakari told Tyree that Smith had stolen her gun. Tyree was upset that Bakari was in contact with Smith and that Smith had her gun. A few days later, Tyree and Bakari resumed living together. On August 20, Bakari texted Tyree that Smith had driven by their house. She stated, "Pretty Tony has the audacity to come over here at our house."

On August 27, 2016, at 4:20 p.m. Tyree and Bakari went to a fried chicken restaurant. Tyree parked his car behind the restaurant. After ordering their food, Bakari saw Smith through the window and said to Tyree, " 'Baby, look. Isn't that Tony?' " " 'Wow. He has the audacity to come here.' " Tyree responded, " 'That's him.' " " 'Don't let him see us. Turn your back because I want to confront him.' "

Tyree and Bakari exited the restaurant and Tyree began to yell loudly at Smith. Two witnesses—employee Arvan Ashley and patron Amanda Cummings—characterized Tyree as "creating kind of a scene," "yelling," and "doing all the talking." Ashley observed the initial part of the argument outside, but then went back into the restaurant where he continued to monitor the argument through the windows. Cummings was inside the

restaurant sitting near a window. Ashley stated Tyree was angry and aggressively “staring [Smith] down.” Cummings stated that although Tyree and Smith were outside the restaurant, Tyree was yelling loud enough that she could hear him inside. Ashley testified people in the restaurant were looking out the window observing the confrontation.

Tyree told Smith “‘[j]ust stand right here until I get back,’” and then walked off towards the parking lot in an aggressive manner. Cummings then said out loud in the restaurant, “He’s going to go get a gun.”

When Tyree returned, Black was outside standing next to Smith. Tyree resumed the argument with Smith, gesturing up and down within an arm’s length of Smith. Tyree was still angry and even more agitated then he was before walking off to the parking lot. Tyree was scowling and “mad-dogging” Smith. Tyree came within a foot or so of Black and started yelling at him as well. Ashley did not observe Black and Smith talking to each other.

Bakari denied that Tyree was yelling at Smith during the argument and stated Tyre was only “frustrated.” Bakari stated Tyree walked up to Smith after returning from the parking lot. Tyree did not have a weapon. She testified she saw Black and recognized him as a passenger in Smith’s car from the August 10, 2016 incident. Bakari testified Black said to Tyree, “‘You better get back up off my OG homie,’” before extending his hand forward with a canvas bag over his hand. She testified she saw the silhouette of what appeared to be a firearm. Bakari testified Smith then told Black, “‘Pop that nigger.’” Black then shot Tyree, after which Black and Smith left the scene.

After the shooting, Bakari stayed at the scene for 15 minutes. She told a responding officer that it was Smith who shot Tyree and that Tyree had told Smith to “ ‘back off my woman.’ ” She did not mention Black. She did not tell the responding officers that anyone involved had said, “You better back up off my . . . homie,” or “Pop that nigger.” At some point after a responding officer continued asking her questions, Bakari demanded that the officer stop asking her questions and she left the location.

Neither Cummings nor Ashley heard Smith or Black say anything to each other before the shooting. There were up to 20 bystanders who observed the argument and the shooting who were interviewed by police detectives. None of them heard Smith or Black say “You better back up off my . . . homie,” or “Pop that nigger.” Bakari told police officers during a later interview that Smith and Black had made these comments.

That evening, Los Angeles Police Department Detective Eric Crosson arrived at the scene to investigate. Crosson procured a surveillance video from the restaurant, which was played for the jury during Bakari’s testimony and admitted into evidence. During Crosson’s investigation, he himself viewed the video approximately 20 to 30 times. The People played the video for the jury again during Crosson’s testimony. Crosson explained in great detail what he saw in the video. Crosson testified that the video played for the jury was “kind of skipping” and that the version of the video he had viewed during the course of his investigation “wasn’t this choppy.”

Black and Smith were ultimately arrested at a burger stand. Portions of Smith’s police interview were played to the jury. Smith initially denied knowing about Tyree’s shooting, but

then told detectives Tyree had a bulge in his clothing and Smith assumed Tyree had a gun.

II. Verdict and Post-Verdict Proceedings

The jury was instructed, in relevant part, on first and second degree murder, manslaughter, self-defense, defense of another, imperfect self-defense, and aiding and abetting. The trial took place over the course of eight days and one morning. The jury deliberated for almost three days. On the second day, the jury requested clarification of aiding and abetting a crime, asking whether helping a perpetrator escape constitutes aiding and abetting. The court responded that assisting a perpetrator after a crime is complete does not amount to aiding and abetting.

The jury found Black and Smith not guilty of first degree murder and guilty of second degree murder. They found true that Black was armed with a firearm and that Smith knew he was so armed. The jury also found Black guilty of possession of a firearm by a felon.

III. Post Verdict Proceedings

After the jury delivered its verdicts, informal conversations with several jurors in the hall revealed the jury had viewed a much more complete and higher quality video than had been presented at trial. Juror No. 8 described the video they saw in the jury room as “ ‘movie quality,’ ” and stated it was substantially clearer than the version presented at trial. The juror stated they were surprised by the enhanced quality of the video they saw in the jury room and that the events in the surveillance video shown at trial “were not very clear.” The foreperson, an engineer, stated the frame rate was higher in the video they saw in the jury room and the quality was smooth and much clearer than the version they saw in court.

Smith and Black filed a petition for access to personal juror identifying information pursuant to Code of Civil Procedure section 206, subdivision (g), and a motion for new trial under Penal Code section 1181.

The evidence presented with the motions revealed the following. The surveillance video disc obtained from the restaurant was loaded with a software program called FLIR that played the video at one frame of video per second. This is the same video disc supplied to the prosecutor and to defense counsel prior to trial. It was the video played for the jury in open court and admitted into evidence.

For deliberations, the prosecutor supplied the jury with a “clean” laptop computer (no internet access; no other software programs) to view the surveillance video and the jury was given both the defense and the prosecution video discs to play on the laptop. A defense expert testified that the prosecutor’s laptop computer contained a program called Windows Media Player, which is part of the Windows operating system and exists on every computer using Windows. Also installed on the laptop was an additional piece of software called a “codec,” which is not part of the Windows operating system and had to have been installed separately. This codec enabled Windows Media Player to display the surveillance video at 30 frames-per-second. The prosecutor and defense counsel informed the court they had never seen the video played at 30 frames-per-second either in or out of court prior to trial.¹

¹ One of the defense attorneys informed the court that she attempted to open the video disc on Windows Media Player without success. “Codec” is a component of a piece of software that decodes aspects of the video file in order to play the content.

The video viewed by all parties prior to and during trial and admitted into evidence was 30 minutes long and displayed on the FLIR player, which only showed 1800 separate frames of video at one frame-per-second. This resulted in a video described by jurors, attorneys, and the court as choppy, unclear, and “herky-jerky.” On Windows Media Player with the codec, however, 53,926 frames of the 30 minute surveillance video are visible. The jury, therefore, was able to view 97% more video footage in the jury room than Black, Smith, and their defense attorneys were able to view prior to and during trial. According to a defense video forensic expert, the surveillance video disc supplied to all parties contains all 30 frames of video per second, however the FLIR software embedded in the original surveillance disc ignores 29 of those 30 frames-per-second and “does not offer any means in which to view . . . all of the available video content” contained on the video disc.

The court denied appellants’ petition for access to personal juror identifying information and the motion for new trial. The court determined the jury did not commit misconduct and found that if the additional 97% of video evidence given to the jury was extraneous within the meaning of Penal Code section 1181, subdivision (2), Black and Smith were not prejudiced by the jury’s consideration of the additional evidence.

IV. Sentencing

Smith moved for dismissal of the two prior strike allegations against him; the court granted the motion as to one of them. The court sentenced Smith to an aggregate term of 36

There are many different types of codecs for different types of video files.

years to life in state prison, consisting of 15 years to life on count 1, doubled as a second strike; five consecutive years for the prior felony conviction; and one consecutive year for the armed principal enhancement. The court sentenced Black to an aggregate term of 40 years to life in state prison, consisting of 15 years to life on count 1, enhanced by 25 years to life for the personal use enhancement. The court imposed a two-year concurrent term on count 2 and granted the People's motion to dismiss the prior prison term allegation.

DISCUSSION

On appeal, Black argues insufficient evidence supported the malice element required for murder; the trial court erred in denying his motion for a new trial; the prosecutor committed misconduct, and the trial court abused its discretion in not striking the firearm enhancement. Smith joins in Black's issues to the extent they accrue to his benefit and also argues the court erroneously allowed Crosson to testify to his opinion of the video surveillance recording; and the trial court erred in denying the petition for access to juror information. Black joins in Smith's issues to the extent they accrue to his benefit.

Because we conclude the trial court erred by denying the motion for new trial and we reverse on that basis, we decline to address the remaining issues.

I. The Jury Committed No Misconduct, But Error Occurred When the Jury Viewed the Additional Surveillance Video

It is of paramount importance to describe what this case is and is not about. First, the undisputed evidence in the record establishes this is a case where the jury inadvertently received from court and counsel additional video footage not admitted into

evidence. This is not a case where a juror brought in outside information from other outside sources. Nor is this a case where a juror created actual bias against a defendant by relating negative information received from an outside source. (See, e.g., *People v. Nesler* (1997) 16 Cal.4th 561, 579-580 [juror related to jury negative information she heard in a bar about the defendant being a bad mother and drug dealer].)

This is a case where additional evidence not admitted at trial was viewed by the jury. The People argue the computer did not show new evidence: it merely afforded greater scrutiny of an exhibit that was already before it. Not so. Tens of thousands of frames of unadmitted video evidence were shown to the jury—frames all counsel and the court never even knew existed. One of each of the 30 frames-per-second was admitted into evidence and argued to the jury; the jury saw the other 29 frames-per-second in the jury room for the first time during deliberations. Thus, this is not a case where the jury examined already admitted evidence using a magnifying glass for clarity (*People v. Turner* (1971) 22 Cal.App.3d 174), or the jury learned little or nothing new from the unadmitted evidence because they had already learned the same facts from the admitted evidence. (*People v. Gamache* (2010) 48 Cal.4th 347, 399 (*Gamache*).) It is a case, as described below, of a jury reviewing unadmitted new evidence not established by the testimony of other witnesses.

Based on this record which establishes an inadvertent viewing of unadmitted evidence, the first question we consider is whether this inadvertent conduct constitutes juror misconduct. We answer no. The jury was given the video disc and the laptop computer without any directions from the court as to how to view the video footage. The video expert testified that the jury did not

have internet access and did not add any software or programs to the laptop while deliberating. The jury simply inserted the disc into the laptop and viewed the video they were given. We therefore agree with the trial court's determination that the jury did not commit any misconduct.

As our Supreme Court has stated: "We have consistently pardoned jurors for considering extrinsic evidence that finds its way into the jury room through party or court error." (*Gamache, supra*, 48 Cal.4th at p. 397.) Where a jury innocently considers evidence it was inadvertently given, there is no misconduct. (*People v. Cooper* (1991) 53 Cal.3d 771, 836.)

Black and Smith argue that the record reflects that the jury immediately recognized that the tape it was viewing was much clearer and less choppy than the version they saw at trial. They argue the jury committed misconduct by failing to bring this to the court's attention. We disagree. The jury does not commit misconduct even if it should have recognized the evidence as "outside evidence" that it was instructed by the court not to consider. (*Gamache, supra*, 48 Cal.4th at p. 399 ["The jurors were not lawyers, nor were they privy to any stipulations the parties might have made about what could or could not be taken into the jury room."].)

Nevertheless, although not misconduct, introduction of the additional video footage into the jury room was indisputably error; the jury should not have been allowed to consider extrinsic evidence in reaching its verdict. (*Gamache, supra*, 48 Cal.4th at p. 396 [mistaken introduction into the jury room of videotape not admitted into evidence was error].) In finding error in *Gamache*, the court held the jury should not have been allowed to consider extrinsic evidence in reaching its verdict based on *Turner v.*

Louisiana (1965) 379 U.S. 466, 472: “The requirement that a jury’s verdict ‘must be based upon the evidence developed at the trial’ goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.” (*Turner*, at p. 472.) The only issue, then, is whether the error was sufficiently prejudicial to warrant a new trial. (*Gamache, supra*, at p. 396.)

II. Standard of Review for Prejudice

When a court inadvertently furnishes a jury with evidence not produced at trial, we independently review whether the jury’s consideration of the additional evidence prejudiced the defendants. We will, however, “ “accept the trial court’s credibility determinations and findings on questions of historical fact if supported by substantial evidence.” ’ ” (*Gamache, supra*, 48 Cal.4th at p. 396.)

Where a jury innocently has access to never-admitted evidence, the error is deemed trial error subject to the same standard of review applied to any evidence admitted over objection. (*Gamache, supra*, 48 Cal.4th at pp. 396-397.) Reversal is required if it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. (*People v Cooper, supra*, 53 Cal.3d at p. 836.) This is the standard by which “ordinary” commonly-recognized trial error is judged. In the absence of misconduct, the burden remains with the defendants to demonstrate prejudice under the usual harmless error standard for ordinary trial error. (*Ibid.*)

III. Black and Smith Were Prejudiced by The Jury’s Consideration of the Additional Evidence

We have reviewed the video surveillance both through the FLIR player, as it was played in open court, at one frame-per-

second and as played in the jury room, at 30 frames-per-second.² The surveillance footage captures the inside of the fried chicken restaurant and a small area outside of the restaurant that is viewable through the floor-to-ceiling glass walls of the restaurant.

On the FLIR player at one frame-per-second, the video shows Tyree and Bakari enter the restaurant and order food. While they are waiting for the food, Black enters the restaurant wearing a backpack. Smith then briefly comes into view; he is outside the restaurant talking on his cell phone. Black's back is to Smith. Smith then walks outside of the view of the camera. The video then shows Tyree walk outside, followed by Bakari. All three are absent from view. Next, Black puts his backpack on top of the trash receptacle inside the restaurant and appears to rummage through it. Smith comes into view again outside the restaurant; he briefly grabs the restaurant's door handle and then releases it. He has his back to Black. Smith then takes a few steps backward to where he is almost in front of Black. He looks at Black through the window and then down at his cell phone. He looks twice more at Black before Black puts on his backpack and leaves the restaurant with what appears to be a black object in his hand. After Black leaves the restaurant he disappears from view and only Smith is observable. Tyree comes

² We viewed People's Exhibit 42, which is the disc played in court and admitted into evidence. At the post-trial evidentiary hearing on the motion for new trial, defense counsel furnished the court with a disc of the surveillance video at 30 frames-per-second in order to replicate what the jury viewed during deliberations. We viewed this disc as well, marked as Defense Exhibit C.

partially into view and it appears he is talking to Smith. After a patron exits the restaurant, Tyree falls to the ground. Smith steps back and out of view.

At 30 frames-per-second, the black object in Black's hand as he exits the restaurant is much clearer. More apparent nonverbal communication is visible between Smith and Black, and Tyree appears to turn toward Black right before the shot is fired. In addition, the 30 frame-per-second video reveals Smith appearing startled when the shot is fired. He makes a quick, jerking motion and then quickly steps back.

The trial court found this additional footage did not amount to prejudice because it shed no light on whether Black acted in self-defense. The court acknowledged the 30 frame-per-second video was clearer and that it shows more than what was played at trial, particularly with respect to any nonverbal communication between Smith and Black. But, the court commented, the clearer video did not establish whether Tyree had a gun which, according to the court, was the "whole sort of thing in this case," because whether Tyree had a gun spoke to whether Black acted in self-defense. The court stated that the self-defense theory was "fully developed in front of the jury," and because the video the jury saw did not "speak to the efficacy" of that defense, there was no prejudice.

We do not agree with the trial court's reasoning. That the video shows more than was played at trial is critical, but equally important is that the video shows aspects of the events about which the eyewitnesses did not testify. This included, critically, what is called the nonverbal communication between Black and Smith on the additional footage. Second, self-defense was only one of the defenses in this case, and it only applied to Black.

Black had also argued to the jury imperfect self-defense, relying on the fact that Black heard Cummings say Tyree was going to get a gun. The 30 frame-per-second video appears to show Tyree moving in Black's direction right before Black fires the shot, a fact which can support Black's imperfect self-defense theory.

Additionally, the trial court made no ruling on the impact of the additional frames on Smith's defense. Smith was convicted as an aider and abetter; therefore, nonverbal communication between Black and Smith, revealed on the 30 frame-per-second video, was crucial to determining Smith's credibility. And the 30 frame-per-second video shows Smith exhibiting a startled reaction after the gun is fired, which he could have argued to the jury was evidence he had no idea Black was going to shoot Tyree.

We find there is a reasonable probability that the verdict would have been different had the additional video frames not been viewed by the jury. The additional frames were nuanced evidence that, when properly confronted, cross-examined, and argued, may have tipped the scales in defendants' favor.

IV. Black and Smith Were Denied Due Process Because They Had No Opportunity to Confront the Additional Evidence

In our view, the fact that the jury was able to view 97% more visual evidence than Black and Smith were prepared to defend amounts to a due process violation. The video was arguably the most critical piece of evidence in this case. Aside from the video footage, the only other evidence of the actual shooting was provided by Bakari, as she was the only testifying witness who observed the shooting itself. The court acknowledged, however, that Bakari was not a credible witness, noting that she was "kind of unique among all witnesses because

she lies with ease. And I think it was very obvious to the jury and everyone else in the courtroom that she lied about all kinds of things . . . that was evident.” Therefore, the video was the most important evidence of the actual shooting.

Black and Smith had no opportunity to defend against the substantial amount of additional visual information the jury was able to consider. “[T]rial by jury in a criminal case necessarily implies at the very least that the ‘evidence developed’ against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant’s right of confrontation, of cross-examination, and of counsel.” (*People v. Nesler*, *supra*, 16 Cal.4th at p. 578, quoting *Turner v. Louisiana*, *supra*, 379 U.S. at pp. 472–473.) “[W]hen a jury considers facts that have not been introduced in evidence, a defendant has effectively lost the rights of confrontation, cross-examination, and the assistance of counsel with regard to jury consideration of the extraneous evidence.” (*Gibson v. Clanon* (9th Cir. 1980) 633 F.2d 851, 854.)

On the facts of this case, the constitutional error, though inadvertent, was far more serious than when the rights of confrontation, cross-examination, and the assistance of counsel are denied before jury deliberations begin because the defendant has no idea what new evidence is being considered.” (*Gibson v. Clanon*, *supra*, 633 F.2d at p. 854.) It was therefore impossible for Black and Smith to offer evidence to rebut the additional video evidence, to explain or otherwise discuss its significance in argument to the jury, or to “take other tactical steps that might ameliorate its impact.” (*Ibid.*)

The jury stated it observed nonverbal communication between Black and Smith in the 30 frame-per-second video,

including a subtle nodding of the head by Smith toward Black. It also observed a subtle movement of Tyree's feet. The jury also stated it observed the way Black held the gun and it could see Bakari jump in between Tyree and Smith prior to the gunshot. The jury revealed it slowed the video to get a clearer picture of events. When the footage is played through the FLIR player as admitted at trial, no nonverbal communication is observable between Black and Smith beyond Smith briefly glancing in Black's direction. The black object Black carries outside the restaurant is only briefly visible, and is not clear. One cannot see any movements in Tyree's feet, the manner in which Black holds the gun, or any indication Bakari moved between Black and Smith.

Black and Smith had absolutely no opportunity to defend against the additional frames of video evidence the jury viewed during deliberations. They had no opportunity to explain this additional information – to highlight portions of the additional information favorable to them or to explain portions unfavorable to them. They had no opportunity to argue to the jury what any of the additional information meant.

Furthermore, defense counsel argued that, had they known that tens of thousands of³ additional frames of evidence were going to be visible to the jury, “every other decision prior to that may very well have been different.” Black's attorney stated that she was not terribly concerned about the surveillance video

³ The jury was provided with two discs of the same surveillance video—a copy from the defense and a copy from the prosecution. The defense expert testified that, on the FLIR player, each disc displays 1800 separate frames. With Windows Media Player and the codec, the video displays 53,926 frames.

during the trial because “it didn’t show much.” She stated the video consisted of a “choppy, disjointed view of images that weren’t connected in a significant way.” The poor quality of the video offered at trial, she stated, “weighed in heavily in Mr. Black’s election not to testify in this case.”

Finally, the jury spent three days deliberating, indicating it was not an open and shut case. (*People v. Woods* (1991) 226 Cal.App.3d 1037, 1052 [deliberations lasting three days along with request for a readback indicated, if nothing else, an element of uncertainty in the jury deliberations].) Defendants were denied their right to confront, cross-examine, and argue this additional footage with the assistance of counsel prepared to meet the additional evidence. Due process was violated.

V. Conclusion

The right to confront all the evidence against a defendant at trial, and to work with counsel to make strategic decisions about how to confront that evidence, lie at the very core of what constitutes a fair trial. Black and Smith were essentially ambushed by tens of thousands of additional frames of visual evidence they did not even know existed. Accordingly, their fundamental rights to confrontation, cross-examination, and counsel were significantly undermined.

Additionally, we conclude there is a reasonable probability that Black and Smith would have obtained a more favorable outcome if either the jury never saw the 30 frame-per-second video, or if the 30 frame-per-second video had been available to all parties before and during trial. Without the additional frames, the jury would not have observed many of the subtle instances of nonverbal communication between Smith and Black. Given that the jury deliberated for three days even *with* this

additional information, we cannot conclude they would have reached the same verdict without it. Additionally, had Black and Smith received the 30 frame-per-second video before trial, they could have highlighted Smith's startled reaction to the gunshot and Tyree's movement toward Black right before the gun was fired.

DISPOSITION

The judgment is reversed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, J.

We concur:

GRIMES, Acting P. J.

WILEY, J.